Supreme Court, U.S.
FILED
JUN 28 2006
OFFICE OF THE CLERK

No. 05-1465

IN THE

Supreme Court of the United States

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Stephen J. Butler
THOMPSON HINE
312 Walnut Street
14th Floor
Cincinnati, Ohio 45202
(513) 352-6700

Debra J. Pearlstein
Elizabeth M. Avery
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Gregory S. Coleman
Counsel of Record
Lisa R. Eskow
Melanie P. Sarwal
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 1350
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

Argument 3

I. Respondents Concede That Courts Do Not Employ a Uniform Scope-of-Arbitrability Test 3

II. The Ohio Court's Contract-Reference Test Cannot Be Characterized as Mere Analysis of the Arbitration Agreement 4

III. The Domestic Origin of Respondents' Claims Does Not Justify the Ohio Court's Contract-Reference Test or Negate the Resulting Conflict 7

IV. The Contract-Reference Test Unjustifiably Precludes Arbitration of Antitrust Claims 8

Conclusion 10

TABLE OF AUTHORITIES

Cases

Aiken v. *World Fin. Corp. of S.C.*,
623 S.E.2d 873 (S.C. App. 2005) 4
Brayman Constr. Corp. v. *Home Ins. Co.*,
319 F.3d 622 (CA6 2003) 3
Brown v. *Coleman Co., Inc.*,
220 F.3d 1180 (CA10 2000) 3
CK Witco Corp. v. *Paper Allied Indus.*,
272 F.3d 419 (CA7 2001) 3
Coors Brewing Co. v. *Molson Breweries*,
51 F.3d 1511 (CA10 1995) 8
Fazio v. *Lehman Bros.*,
340 F.3d 386 (CA6 2003) 3, 6
JLM Indus., Inc. v. *Stolt-Nielsen S.A.*,
387 F.3d 163 (CA2 2004) 9
Loy v. *Harter*,
128 S.W.3d 397 (Tex. App. 2004) 4
Mail-Well Envelope v. *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 54*,
916 F.2d 344 (CA6 1990) 6
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*,
473 U.S. 614 (1985) 5, 7
Nghiem v. *NEC Elecs., Inc.*,
25 F.3d 1437 (CA9 1994) 7
Oldroyd v. *Elmira Sav. Bank, FSB*,
134 F.3d 72 (CA2 1998) 3
Pennzoil Exploration & Prod. Co. v. *Ramco Energy Ltd.*,
139 F.3d 1061 (CA5 1998) 3
Shearson/Am. Express, Inc. v. *McMahon*,
482 U.S. 220 (1987) 7

TABLE OF AUTHORITIES—CONTINUED

Simula, Inc. v. *Autoliv, Inc.*,
175 F.3d 716 (CA9 1999) 3
UBS PaineWebber, Inc. v. *Cohen*,
537 U.S. 974 (2002) 4

IN THE

Supreme Court of the United States

No. 05-1465

UNITED HEALTHCARE OF OHIO, INC.,
Petitioner,

v.

ACADEMY OF MEDICINE OF CINCINNATI, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Court should grant the petition to resolve the conflict between the touch-matters arbitrability test used in most jurisdictions and the restrictive contract-reference test authorized by the Ohio Supreme Court. By conceding that two tests exist and by failing to deny the inevitability of forum shopping and gamesmanship resulting from Ohio's contract-reference test, respondents confirm the need for the Court's review of the proper arbitrability standard for statutory and tort claims.

Although respondents attempt to marginalize the significance of the contract-reference test by recharacterizing it as a mere tool for factual analysis of allegations in a complaint, they cannot deny that the contract-reference test conclusively determines whether a claim will be arbitrable. Nor can they demonstrate how, as they contend, the two tests can coexist in

a complementary manner when the contract-reference test has a critically different focus than the touch-matters analysis performed by most courts. Specifically, the touch-matters standard focuses on the language of parties' arbitration agreements and faithfully carries out congressional intent to ensure their enforceability, whereas the contract-reference test focuses on the litigation claims themselves and never seriously looks at the terms to which the parties agreed.

These fundamentally disparate approaches yield strikingly different results when, as in this case, the parties' arbitration agreement is broad, encompassing "any disputes about their business relationship." If a court begins, under the touch-matters test, with that language, the relevant arbitrability inquiry is whether a dispute touches, in any way, the parties' business relationship. Price-fixing allegations based on contractually established rates unquestionably do. But if, as in Ohio, a court begins its inquiry by asking whether the claims reference the contract, the scope of the parties' arbitration agreement becomes immaterial. Neither the FAA nor this Court's arbitrability directives permit that result. By ignoring the language of the parties' agreement and inquiring, instead, whether the asserted claims reference the underlying contract, the contract-reference test frustrates congressional intent by permitting courts to unjustifiably restrict the enforceability of arbitration agreements and by enabling parties to use artful pleading to escape their arbitration obligations. The Court should grant the petition to resolve the conflict over the proper arbitrability standard for statutory and tort claims created by the contract-reference test—which has been applied not only by Ohio, but by Kentucky (presented in companion petition No. 05-1466) and by Texas and South Carolina as well.

ARGUMENT

I. RESPONDENTS CONCEDE THAT COURTS DO NOT EMPLOY A UNIFORM SCOPE-OF-ARBITRABILITY TEST.

Respondents' acknowledgement that courts rely on more than one test for scope-of-arbitrability analysis of statutory and tort claims confirms the need for the Court's review. Br. Opp'n 10-11. Recognizing the existence of two distinct tests—*Mitsubishi*'s touch-matters test and the contract-reference test adopted by the Ohio Supreme Court—respondents argue for their coexistence and independent usefulness. Br. Opp'n 10-11.[1] But the unavoidable variation in arbitration and FAA enforcement that results from

---

[1] Respondents acknowledge courts' use of the touch-matters test but wrongly suggest that it is not widely adopted. The federal courts of appeals have consistently applied that standard, however, and their reliance on the touch-matters test stands in sharp contrast to Ohio and Kentucky's adoption of the contract-reference test, which also is used in Texas and South Carolina. See, *e.g.*, *Fazio* v. *Lehman Bros.*, 340 F.3d 386, 395 (CA6 2003) (citing touch-matters test in compelling arbitration of broker dispute); *Brayman Constr. Corp.* v. *Home Ins. Co.*, 319 F.3d 622, 626 (CA3 2003) (applying touch-matters test in compelling arbitration of workers-compensation dispute); *CK Witco Corp.* v. *Paper Allied Indus.*, 272 F.3d 419, 422-424 (CA7 2001) (citing touch-matters test and holding that labor disputes under collective-bargaining agreement were subject to arbitration); *Brown* v. *Coleman Co., Inc.*, 220 F.3d 1180, 1184 (CA10 2000) (applying touch-matters test and affirming district court's finding that the arbitration panel correctly asserted jurisdiction over the defamation claim); *Simula, Inc.* v. *Autoliv, Inc.*, 175 F.3d 716, 721-723 (CA9 1999) (applying touch-matters test and holding that antitrust claims were fully arbitrable); *Pennzoil Exploration & Prod. Co.* v. *Ramco Energy Ltd.*, 139 F.3d 1061, 1068 (CA5 1998) ("With such a broad arbitration clause, it is only necessary that the dispute 'touch' matters covered by the [contract] to be arbitrable."); *Oldroyd* v. *Elmira Sav. Bank, FSB*, 134 F.3d 72, 77 (CA2 1998) (applying touch-matters test and holding that, because retaliatory-discharge claim touched upon matters covered by the employment agreement, it was within the scope of the agreement's arbitration clause).

inconsistent arbitrability standards should not continue and warrants the Court's attention.

Attempting to diminish the effect of conflicting arbitrability standards, respondents erroneously characterize the contract-reference test as cabined within Ohio and Kentucky, failing to even acknowledge the other state-court decisions cited in the petition as examples of the growing, contract-reference-test trend. See Pet. 11-12 (citing *Aiken* v. *World Fin. Corp. of S.C.*, 623 S.E.2d 873, 875, 876 (S.C. App. 2005), and *Loy* v. *Harter*, 128 S.W.3d 397, 403-405 (Tex. App. 2004)). Respondents include *Aiken* and *Loy* within a discussion of decisions declining to compel arbitration of non-breach-of-contract claims, Br. Opp'n 24, but they glaringly omit that these state courts used the contract-reference standard to deny arbitration in those cases. The South Carolina and Texas decisions, in conjunction with the Ohio and Kentucky decisions currently before the Court, confirm state courts' growing reliance on the contract-reference test and its constrictive effects on arbitrability of antitrust and other statutory claims.[2]

II. THE OHIO COURT'S CONTRACT-REFERENCE TEST CANNOT BE CHARACTERIZED AS MERE ANALYSIS OF THE ARBITRATION AGREEMENT.

Respondents erroneously attempt to deflect the Court's attention from Ohio's restrictive arbitrability standard by emphasizing that court's recitation of various bedrock

---

[2] Respondents incorrectly suggest that the Court's denial of a petition for writ of certiorari four years ago in an unrelated case indicates that arbitrability-standard issues are generally inappropriate for review. See Br. Opp'n 27-28 (citing *UBS PaineWebber, Inc.* v. *Cohen*, 537 U.S. 974 (2002) (denying certiorari)). That denial, for whatever reason, obviously does not preclude the Court's consideration of the arbitrability issue in this case and, to the contrary, emphasizes the recurring nature of this kind of issue.

arbitrability principles that were not seriously at issue in the case. Br. Opp'n 1, 4-7, 13-18. That hollow recitation, however, cannot insulate from scrutiny Ohio's rule requiring that a cause of action reference the underlying contract to be arbitrable. The contract-reference test is not merely a tool for assessing the factual underpinnings of a claim, irrespective of its label, see, *e.g.*, Br. Opp'n 10, but a substitute for traditional arbitrability analysis, which focuses instead on the language in the arbitration agreement and whether a claim touches matter within the scope of that agreement. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.13 (1985).

The contract-reference test does not require a court to even look at the language chosen by the parties to define their agreement to arbitrate. Tellingly, in applying the contract-reference test, the Ohio Supreme Court conducted no analysis at all of the parties' arbitration agreements in reaching its holding. Lacking any textual analysis, the court of appeals had reasoned solely that the "allegations . . . neither relied on nor referred to a contract or a provider agreement between the doctors and the HMOs," App. 10a-11a, and the Ohio Supreme Court's affirmance of that decision expressly approved the propriety of the contract-reference test. App. 21a. The contract-reference test drove the court's decision, not the terms of the arbitration agreement.

A simple example highlights the difference. Even if the parties had written into their contract that they specifically agreed to arbitrate any state-law antitrust claims, the Ohio courts would have been free to disregard that agreement merely because the claims themselves made no reference to the contract. Although that kind of scenario is unlikely to present itself to a court because most arbitration agreements do not contain that kind of claim-specific language, the decisions that use the contract-reference test to deny

arbitration provide no means to enforce such a claim-specific arbitration agreement, except by using a different test.

Respondents attempt to cloak the contract-reference test's jettisoning of textual analysis with the authority of the Sixth Circuit's decision in *Fazio* v. *Lehman Bros.*, 340 F.3d 386 (CA6 2003), but *Fazio* faithfully analyzed the parties' arbitration agreement and relied on the touch-matters standard to compel arbitration under a broad agreement. The Ohio court's invocation of *Fazio*, as demonstrated in the petition, used a partial extraction of an excerpt of the *Fazio* holding to justify a conclusion that is completely at odds with both the form of analysis and holding of the Sixth Circuit. Pet. 12-13. And respondents offer no other basis to conclude that the Ohio court merely performed an arbitrability analysis guided by accepted principles of interpretation.[3]

---

[3] Respondents attempt to sidestep the conflict caused by Ohio's adoption of the contract-reference test by offering two untenable, alternative justifications for the Ohio courts' refusal to compel arbitration in this case—neither of which were relied on by the courts below. First, they observe that two respondents are medical societies that are not signatories to a contract with United containing an arbitration agreement, Br. Opp'n 16—ignoring that respondents are primarily individuals who are signatories bound to arbitrate with United, which creates a live controversy regarding arbitrability. Moreover, the medical societies sued solely based on associational standing—that is, on behalf of individual member-respondents who are contractually bound to arbitrate with United. Second, respondents erroneously contend that the alleged price-fixing conspiracy predates some of the business relationships and, therefore, falls outside the arbitration agreements. Br. Opp'n 18. This argument ignores that the terms of the arbitration agreement are not limited to disagreements arising after the contract's execution but instead encompass "*any* disputes" about the parties' business relationship, with no temporal constraints. See, *e.g.*, *Mail-Well Envelope* v. *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 54*, 916 F.2d 344, 348 (CA6 1990) (compelling arbitration of claims based on conduct prior to effective date of agreement because court lacked positive assurance that arbitration provision did not encompass such claims).

III. THE DOMESTIC ORIGIN OF RESPONDENTS' CLAIMS DOES NOT JUSTIFY THE OHIO COURT'S CONTRACT-REFERENCE TEST OR NEGATE THE RESULTING CONFLICT.

In an effort to minimize the sharpness of the Ohio court's conflict with other courts' routine recognition of the arbitrability of antitrust claims, respondents wrongly suggest that *Mitsubishi* was confined to international antitrust claims and that the arbitrability of domestic antitrust claims is an open question in the federal and state courts. Br. Opp'n 19-21. The Court's explicit extension of *Mitsubishi* to domestic antitrust claims in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 242-243 (1987), forecloses respondents' attempt to downplay the conflict represented by the Ohio decision and underscores the significance of the contract-reference test's exclusion of antitrust claims from arbitration. Moreover, the premise of respondents' contention that the contract-reference test does not conflict with antitrust-arbitration decisions rests on an outdated and discarded distinction between international and domestic antitrust contexts. In *Mitsubishi*, the Court rejected anti-arbitration rationales without any limitation to an international context. See 473 U.S., at 627, 632-637; see also *Nghiem* v. *NEC Elecs., Inc.*, 25 F.3d 1437, 1441, 1442 (CA9 1994). Respondents' characterization of the contract-reference test as a permissible approach to domestic antitrust claims, therefore, lacks any credible basis in law and cannot justify the Ohio court's departure from established FAA requirements and the arbitrability principles articulated by this Court.

IV. THE CONTRACT-REFERENCE TEST UNJUSTIFIABLY PRECLUDES ARBITRATION OF ANTITRUST CLAIMS.

In the face of courts' consistent recognition of the arbitrability of antitrust claims, respondents offer an uncontroversial—and irrelevant—observation that the arbitrability of antitrust claims ultimately depends on the governing arbitration agreement and that arbitration is not "*per se*" mandated for antitrust claims. Br. Opp'n 19-25. That is undoubtedly true, but respondents fail to engage the critical point that the contract-reference test effectively *per se* excludes antitrust claims from arbitrability, robbing governing arbitration agreements of any force.[4] The conflict identified by the petition is not whether antitrust claims always should be arbitrated—the focus of respondents' attention—but whether the contract-reference test permissibly precludes arbitration even when parties agree to a broad arbitration provision that reaches antitrust claims.

The contract-reference test has a particularly restrictive effect on the arbitrability of antitrust claims because they almost always can be pleaded without reference to the underlying contract, even if the allegations necessarily implicate the parties' business relationship. In this case, for example, respondents allege a price-fixing conspiracy that centers on the rates negotiated by the parties. As the Ohio dissenters correctly observed, App. 24a, that alleged conspiracy unquestionably involves the parties' "business relationship" and, therefore, falls within the scope of their

---

[4] Respondents' extended discussion of *Coors Brewing Co.* v. *Molson Breweries* does nothing more than establish the unexceptional proposition that *Mitsubishi* does not mandate arbitration of all antitrust claims but, instead, requires courts to analyze the terms of the parties' arbitration agreement to determine whether an antitrust claim falls within its scope. 51 F.3d 1511, 1515-1517 (CA10 1995). That analysis of the language of the arbitration agreement never occurs under Ohio's contract-reference test.

agreement to arbitrate. And the soundness of that reasoning is confirmed by the Second Circuit's price-fixing arbitrability analysis in *JLM Industries, Inc.* v. *Stolt-Nielsen S.A.*, 387 F.3d 163, 167 (CA2 2004).

Respondents unsuccessfully attempt to distinguish the specific conflict between the Ohio decision and *JLM Industries* by noting that the language of the arbitration agreements in the two cases was not identical. Br. Opp'n 25. The differences, however, are merely cosmetic—the two arbitration agreements both evidence the widest possible reach, eliminating any basis for a real distinction. Respondents also emphasize *JLM*'s international context, but the international and domestic contexts are utterly irrelevant to the arbitrability determination in both cases. Finally, respondents note the Second Circuit's cautionary comment about the touch-matters standard, but the court nevertheless used that standard to determine arbitrability. *JLM*, 387 F.3d, at 174.

The Ohio Supreme Court has joined several other states in applying a test that improperly disregards the language the parties used to define their agreement to arbitrate and, consequently, frustrates congressional intent in seeking to secure through the FAA a robust enforcement mechanism that would end, not encourage, judicial hostility to arbitration. A square conflict exists over the proper arbitrability standard, and the Court should resolve whether antitrust and other noncontractual claims can be subjected by state courts—or federal courts emboldened by the state-court trend—to a different arbitrability test.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Stephen J. Butler
THOMPSON HINE
312 Walnut Street
14th Floor
Cincinnati, Ohio 45202
(513) 352-6700

Debra J. Pearlstein
Elizabeth M. Avery
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Gregory S. Coleman
Counsel of Record
Lisa R. Eskow
Melanie P. Sarwal
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Suite 1350
Austin, Texas 78759
(512) 349-1930

Counsel for Petitioner

June 28, 2006